IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 12TH OCTOBER 2006 / 20TH ASWINA 1928

MACA.No. 1407 of 2005()

OPMV.716/2001 of MOTOR ACCIDENT CLAIMS TRIBUNAL, THODUPUZHA

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APPELLANT/2ND RESPONDENT:

NATIONAL INSURANCE COMPANY LIMITED,
ALUVA NOW REPRESENTED BY ITS ASSISTANT MANAGER,
REGIONAL OFFICE, AJAY VIHAR, KOCHI-16.

BY ADV. SRI.MATHEWS JACOB (SR.)
SRI.JACOB MATHEW.P.

RESPONDENTS:

K.M. JABBAR, S/O. MOHAMMED,
KALAPPURACKAL HOUSE, EDAVETTY P.O.,
KARIKODU VILLAGE, THODUPUZHA TALUK.

BY ADV. SRI.T.J.MICHAEL
SRI.P.NOOR SEMIR

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 12/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

M.A.C.A.No.1407 OF 2005

Dated this the 12th day of October, 2006

JUDGMENT

1. Alleging that he suffered certain injuries in a motor accident, the respondent applied for compensation under Sections 163-A and 166 of the Motor Vehicles Act, 1988 ("the Act" for short), alleging negligence on the driver, though none was impleaded in that capacity.

2. The owner did not contest.

3. The appellant – insurer disputed the liability and also challenged the maintainability of the composite application, filed invoking Sections 163-A and 166. Faced with such objections, the claimant applied for deletion of Section 166 from the application.

4. The documentary evidence was, thereafter, taken on record. No oral evidence was adduced.

5. The Tribunal did not find that the claimant suffered any permanent disablement. Nor was on record, any certificate, by the competent, to that effect. Bereft of that, the application was

unsustainable under Section 163-A. The claimant pleaded his monthly income as Rs.5,000/-, that is, an annual income of Rs.60,000/-, well above the bench mark of Rs.40,000/-, to sustain the claim under Section 163-A.

6. Yet, the Tribunal passed the impugned award for compensation under different counts, including pain and suffering.

7. The Apex Court laid down in **Deepal Girishbhai Soni v. United India Insurance Co. Ltd., (2004) 5 SCC 385** that a claimant cannot pursue his remedies, simultaneously, under Sections 163-A and 166, such remedies being independent of each other, and Section 163-A, being a social security provision providing for a distinct scheme, only those with annual income up to Rs.40,000/- can take the benefit thereof, leaving all other claims to be determined in terms of Chapter XII of the Act, in which Section 166 is included.

8. In this case, there is one more aspect which requires attention. The claimant pleaded that his monthly income is Rs.5,000/-. The Tribunal reduced it to Rs.2,000/- and thus proceeded to make the award. It was held in **Deepal Girishbhai** (***supra***) that the annual income of Rs.40,000/- cannot be treated as a cap as found in **Oriental Insurance Co. Ltd**. v. **Hansrajbhai** [**2001 (2) KLT 235 SC**] and that the proceedings under Section 163-A are confined to be invoked by persons whose annual

income is only up to Rs.40,000/-. Therefore, a person who alleges that his annual income is above Rs.40,000/- cannot invoke Section 163-A, prosecute proceedings and thereafter, get the benefit of the finding of the Tribunal that his proved income is only below the bench mark of Rs.40,000/-, the statutory limit for invoking Section 163-A. So much so, the Tribunal erred in adjudicating the application under Section 163-A as long as it continued with the pleading that the monthly income of the claimant is Rs.5,000/-.

9. In the aforesaid situation, the learned counsel for the claimant attempted to canvass that though the Tribunal deleted Section 166 at the request of the claimant and treated the claim under Section 163-A, the award is, in effect, one under Section 166, going by the nature of the counts on which compensation has been awarded.

10. Per contra, learned counsel appearing for the appellant – insurer argued that the parties went to trial on the definite premise that the application is under Section 163-A and if the application was to be one under Section 166, the insurer ought to have been afforded opportunity to meet it on its merits. He submitted that the facts of the case appear to disclose that the claimant attempted to accuse a third person as the driver of the vehicle and later on, when faced with the written statement of the insurer, turned round, virtually admitting his guilt as the

driver and thereby wanting to prosecute his claim under the canopy of Section 163-A and that the claimant is disentitled to turn topsy-turvy in an attempt to sustain the award, which is passed in excess of jurisdiction under Section 163-A, invoked by the claimant. He further urged that even if a composite application is filed, as in this case, the claimant has to elect before trial and stand by his such election. It is urged that if the impugned award passed after the claimant confined his application to be under Section 163-A, is to be treated as one under Section 166, it will result in upholding a misdirected trial and lead to miscarriage of justice.

11. In **Deepal Girishbhai (*supra*)**, it was held as follows:

> "We, therefore, are of the opinion that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both."

12. Sections 163-A and 163-B, which form a code by themselves, were inserted by Act 54 of 1994 with effect from 14.11.1994. However, no provision similar to Section 176 has been made enabling the State Government to make rules for the purpose of

prescribing the form of application for compensation under Section 163-A. Section 176 provides power to the State Government to make rules for the purpose of carrying into effect the provisions of Sections 165 to 174. The Central Government is empowered by Section 164 to make rules for the purpose of carrying into effect the provisions of Chapter XI. Since it relates to Courts and Tribunals, the procedure can be, to be insisted upon, one provided by rules framed under Section 176 by the State Government. Chapter X of the Kerala Motor Vehicles Rules, 1989 ("the Rules", for short) relates to Tribunals. Rule 371 prescribing the Form of application is part of the rules made in 1989, before the insertion of Sections 163-A and 163-B into the Act. So much so, there is no separated and specific form to apply for compensation under Section 163-A while there is one for application under Section 166.

13. After notice to parties in terms of Rule 377 and filing of written statement in terms of Rule 378, issues are to be framed (Rule 379). Issuance of summons for examination of witnesses follows in terms of Rule 380. Rule 388 provides the method of recording evidence. Going by the scheme of Chapter X of the Rules, the first consideration of the entire pleadings and rival contentions by the Tribunal, in the presence of the contesting parties, will be at the stage of framing issues. Once issues are settled, trial has to proceed on the basis of the issues.

14. The provisions under Section 163-A and Section 166 being different, one cannot pursue the remedies under both the provisions simultaneously. He has to opt/elect to go either for proceedings under Section 163-A or those under Section 166. Construed so, it could well be pointed out that it is appropriate and optimal that the option or election is exercised by the claimant while invoking the Tribunal's jurisdiction, that is, at the institution of the application.

15. Having regard to the social welfare concept behind constituting the Tribunals and the fact that litigations of such nature relating to claim for compensation on account of death or bodily injury, would have already been filed invoking both the provisions and may be pending, the point of time for the claimant to exercise option to confine under Sections 163-A or 166 could be during the pendency of the matter before the Tribunal, without affecting the rights of parties to a fair trial and within the framework of the law, as laid in **Deepal Girishbhai (*supra*)**. Propriety would require that the election by the claimant as between the two different proceedings under Sections 163-A and 166 is to be made at or before the settlement of issues. If option is exercised at least at that stage, the opposite party could be granted, if necessary, a further opportunity to place further pleadings on record before the parties go to trial, after the settlement of issues. Such trial will not deflect the course of justice, but will lead to an end of the lis , on a complete

adjudication of the issues that would arise on the rival contentions. No injustice would be caused by such an approach. On the one hand would be the claimant, a victim of a motor accident or his dependants, while on the other, would be the entitlement of the driver, owner or insurer to a just and fair trial to contest, either in an adjudication under Section 166 or for an immediate relief under Section 163-A. Viewed in this angle, it is just and proper to extend to the claimant an opportunity, at or before the framing of the issues, to opt among the two proceedings. Upon such choice being exercised, the respondents would be entitled to place such further pleadings that may be necessary on the facts and circumstances of the case. If a choice is not so made, it would entail disposal of the claim petition, unless the Tribunal gives an opportunity to exercise option, may be on such terms as to costs, as it may deem fit.

Having regard to the aforesaid, this appeal is allowed in the following terms:

(i) The impugned award is set aside and the case remanded.

(ii) The parties will appear before the Tribunal on 20.12.2006.

(iii) Following the remand, the parties will stand relegated to the stage of consideration of the application of the claimant to

treat the application as one under Section 163-A. For such purpose, any order already passed by the Tribunal on that application will stand set aside.

(iv) The parties will be entitled to file additional pleadings or apply for amendment of pleadings. This will also include an opportunity to the claimant to apply to amend the claim petition even as regards his income, if he desires to do so.

(v) The Tribunal will thereafter, decide the matter either under Section 163-A or one under Section 163-B as may be opted for by the claimant.

(vi) Further trial and decision will be untrammelled by anything stated herein or in the impugned award, touching the merits of the claims and rival contentions.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.